THE TUBWOMEN *v.* THE BREWERS OF LONDON.

At the commencement of the last century the common law doctrine of conspiracy as affecting combinations to raise or lower wages was thoroughly examined in our courts by eminent counsel and judges with reference to its applicability to New World conditions. Such combinations, in so far as they tended to alter the so-called natural market values of labor, by interfering with competition, were deemed restraints of trade, infringing public right, and, therefore, indictable. To-day they are authorized by statutes both with us and in England; and at the close of the nineteenth century a President of the United States, before laying a corner-stone with the perfunctory trowel, joined a labor union for the sake of regularity; and his successor also enrolled in a widely ramified organization of manual workers with which he had not been particularly identified as a wage earner. The time has come, apparently,

> "*Quand on conspire,*
> *Quand sans frayeur*
> *On peut se dire conspirateur.*"

Judges and textwriters alike admit the difficulty, if not impossibility, of defining "unlawful conspiracy," which, like fraud, must be often spelled out from the circumstances of the case. Even Mr. Wright, in his exhaustive collection of English cases, modestly says, "No intelligible definition of 'conspiracy' has yet been established. The object of these sections is to collect material for such a definition."[1]

The weight of judicial authority is that a combination to increase or lower wages was not made an offence by statute; but was a conspiracy under the common law

[1] The Law of Criminal Conspiracy and Agreements, Philadelphia edition (1887) pp. 11–12. cf. State *v.* Burnham (1844) 15 N. H. 396 at 402; State *v.* Donaldson (1867) 32 N. J. L. 151 at 152; Smith *v.* People (1860) 25 Ill. 17 at 23; State *v.* Glidden (1887) 55 Conn. 46 at 68.

adopted by certain States of our Union as applicable to their conditions when born into Statehood.[1]

But the first enunciation of the broad rule that an agreement is an indictable conspiracy at common law, although only to do that which the parties thereto might, as individuals, lawfully do, is attributed to the case of The Tubwomen *v.* The Brewers of London. Just who the Tubwomen were we are not told, or why they had trouble with the Brewers, or what that trouble was. *Eo nomine* they enter the law reports on Monday, November 6th, 1721, in company with the King and the Journeymen Taylors of Cambridge,[2] whose case notwithstanding severe criticism is still cited as authority.[3] These tailors were found guilty of conspiring amongst themselves to raise their wages and it was urged in arrest of judgment, among other errors, that no crime appeared upon the face of the indictment, which only charged them with conspiracy and refusal to work at so much per diem, whereas they were not obliged to work at all by the day, but only by the year,[4] and that the indictment should conclude *contra formam statuti*,—since it was by statutes that journeymen tailors were prohibited to enter into any contract or agreement for advancing their wages[5] and the offence made criminal;[6] but the Court held that although the indictment charged refusal to work except for more than statutory wages, yet it was not for refusing to work, but for conspiring, that they were indicted, "*and a conspiracy of any kind is illegal*

[1] State *v.* Buchanan (1821) 5 Har. & J. 317 and the cases cited; Trial of the Boot and Shoemakers of Philadelphia, pamphlet (1806); Trial of the Journeymen Cordwainers of New York, pamphlet (1810), Yates' Select Cases; less fully as People *v.* Melvin (1810) 2 Wheeler's Crim. Cases 262; Trial of Twenty-four Journeymen Tailors, Phila. (1827); Commonwealth *ex rel.* Chew *v.* Carlisle, Hall (1822) Journ. Juris, 225; s. c. Brightley's N. P. 36; People *v.* Fisher (1835) 14 Wend. 9; Commonwealth *v.* Hunt (1842) 45 Mass. 111 reversing Thacher's Crim. Cases 609; State *v.* Norton (1850) 23 N. J. L. 33; Master Stevedores *v.* Walsh (1867) 2 Daly 1; State *v.* Stewart (1887) 59 Vt. 273; National Protective Ass'n *v.* Cummings (1902) 170 N. Y. 315; (contra) and State *v.* Burnham and other cases (*supra*). There is no conspiracy at common law in U. S. courts but Federal judges go to common law to ascertain in actions for conspiracy under the statute the meaning of the term, U. S. *v.* Martin (1870) 4 Cliff. 156; Pettibone *v.* U. S. (1892) 148 U. S. 197 at 203.

[2] (1721) 8 Mod. 11.

[3] Matter of Davies (1901) 168 N. Y. 89 at 101; Quinn *v.* Leathem [1901] A. C. 495.

[4] 5 Eliz. Ch. 4. [5] 7 Geo. 1 Ch. 13. [6] 2 & 3 Edw. VI ch. 15.

although the matter about which they conspired might have been lawful for them or for any of them to do if they had not conspired to do it, as appears in the case of the Tubwomen v. *The Brewers of London* (a) ",[1] and also that "the indictment need not conclude *contra formam statuti* because it is for a conspiracy which is an offence at common law." The omission to cite any report as sponsor for the Tubwomen on their first appearance, has given rise to grave suspicions and made them the Mrs. Harrisses of the law reports, whose existence some have denied, while others identify their case, and probably correctly, with the King *v.* Starling, or Sterling, and other brewers, which is said to have brought into the law the new principle, that it is criminal for A to combine with others to do that which acting alone he may lawfully do. From the rule attributed, with the sweeping generality of the indicative mood, to the Tubwomen's Case innumerable absurdities may be deduced by the most witless and have been by the witty; and of late the principle involved has been as broadly denied: yet its basic idea, stated in the subjunctive form, still influences judicial decision; being, after all, a phrasing of the Horatian wisdom *sit modus in rebus.* A thousand things innocent in detail may be—though they are not always necessarily so—harmful in combination. A grain of powder, to use the illustration of Erle, J., and Lord Brampton, explodes harmlessly where the explosion of a pound works havoc. A drop of water following the Mississippi's channel is beneficent, infinitesimally, perhaps, by the very fact of its combination with others; but the multitudinous drops combining to force their way out of the channel, break down levees and monopolize the dry land, illustrate the potentialities of evil in the simultaneous exertion of forces that, operating in detail or reasonable combination, work for good. But while the doctrine attributed to the case of the Tubwomen was—as, perhaps, they were—unduly broad, we may well ask whether it was more so than the converse rule expressed with equal latitude in some judicial opinions of to-

[1] Our italics. The case is quoted from the 2d edition of Modern by Mr. Leach (1795) who says that he "has done his best endeavors to supply the defects of the former wretched edition" published forty years before. "This case was twice argued and here both arguments are blended together." No citation follows "(a)" in the foot-note of the Tailor's case.

day that "workingmen," *i. e.*, manual workers and employees, may not only lawfully abstain or desist from work unsatisfactory to them by reason of its nature or compensation, but may go further and not only by indirection but even by direct means force employers to discharge servants because the latter have become distasteful to organized bodies of laborers either as "scabs" or, perhaps, only as members of rival organizations.[1] It may, therefore, be worth while to examine some cases wherein the rule of the Tubwomen has been considered.

Grose, J., apparently following The Taylors of Cambridge, said in Mawbey's Case[2] wherein magistrates were charged with conspiring to pervert the course of justice by producing false certificates: "In many cases an agreement to do a certain thing has been considered as a subject of indictment for a conspiracy, though the same act if done separately by each individual without any agreement among themselves would not have been illegal. As in the case of journeymen conspiring to raise their wages, each may insist on raising his wages if he can; but if several meet for the same purpose, it is illegal and the parties may be indicted for conspiracy."[3] In 1806 divers boot and shoe makers were indicted and tried in the Mayor's Court of Philadelphia[4] for conspiring to do no future work except for higher prices; to prevent by threats, menaces and interferences other artificers from working at prices less than those fixed by the conspirators; to unite in a club with unlawful, arbitrary by-laws for the government of them-

[1] See Special Term Judgments in Beattie *v.* Callanan vacating a temporary injunction restraining defendants from maliciously, by threats, causing persons to break contracts with plaintiff because he had affronted a "walking delegate" [rev'd (1901) 67 App. Div. 14; 73 N. Y. Supp. 518] and dismissing the complaint at trial on its merits upon the supposed authority of Natl. Protection Assn. *v.* Cummings, *supra* [also rev'd (1903) 81 N. Y. Supp. 413].

[2] (1796) 6 T. R. 619.

[3] Daley, F. J., in Master Stevedores *v.* Walsh, *supra*, said that this statement is only by way of illustration, and denied that any reported case so held, the like expression by Recorder Levy in the Philadelphia Bootmakers Case being *obiter;* and Erle, J., in his treatise on the Law Relating to Trades-Unions, says that this dictum of Grose was not pertinent to the adjudication or supported by examples, and if true, can be so only where simultaneity is the essence of the criminality of the act: cf. Hilton *vs.* Eckersley (1856) 6 E. & B. 47 at 53 & 69.

[4] Trial of the Boot and Shoemakers of Phila., *supra*.

selves and other artificers, and to work for no master who should employ anyone working for less than prescribed wages, or breaking any of said by-laws; all this to the prejudice and oppression of masters and of other journeymen and against the peace of the commonwealth. Several witnesses were called to support the bill, of whom the principal was Job Harrison, who, on arriving in this country in 1794, had been notified that unless he joined the Journeymen Cordwainers he would be "scabbed,"—a term explained to him as meaning that no other man would sit on the seat where he worked, or board or lodge in the same house, or work for the same employers with him if he incurred that ban. Having a large family, he joined the organization. Being a skillful workman his employer promised him extra pay if he could make light dress shoes after the London fashion. He succeeded, obtained his own price, and was contentedly supporting his family when the Cordwainers, in order to increase the pay of boot makers, ordered a "turn out." Job protested that he had nothing to do with boots, received good pay for making shoes, and with a sick wife and young family "was not able to stand it." But, said he, "All the remonstrances I could make were of no use, I must turn out; unless my employer would pay their price for making boots I must refuse to make shoes. At that time I was from hand to mouth and in debt owing to the sickness of my family, and market work was only from 3s. to 3s. 6d. a pair (Job was getting 9s. a pair for his better work). I concluded at the time I would turn a scab unknown to them, and I would continue my work and not let them know it. I did not desire more wages than I got; more could not be looked for nor could not be given." So he actually became a member of the "tramping committee," whose business was "to watch the Jers that they did not scab it." It has been well said that liars are begotten of tyranny on fear; and Job striving to support his family by work at satisfactory wages lied, but in vain. Unable to deceive a neighbor, Swayme, he said to him, "Swayme, you know my circumstances; my family must perish or go to the bettering house unless I continue my work." And Swayme—answering that he knew the case was desperate, "but a man had better make

any sacrifice than turn a scab at that time,"—reported his friend. Thereupon the unpaid tramping committee on which Job had disingenuously served was cut down to one salaried man, forerunner of the "delegate" and "business agent," while Job turning at bay worked openly for his employer, who stood by him with splendid loyalty, or obstinacy, paying him full wages and holding out for many months against the strikers at what was the then great loss of $4,000 in a year. There was evidence in the case of the threats and violence always unfortunately coincident with attempts by one set of men to keep others from work. But the main issue was the criminality of the conspiracy to raise wages. To this point Mr. Hopkinson for the prosecution, admitting every man's right to work for such wages as suited him and to refuse to work upon unsatisfactory terms, cited Blackstone,[1] that every confederacy to do acts prejudicial to others is indictable, as to raise wages, etc., Hawkins,[2] "when divers persons confederate together in order to prejudice a third person it is indictable as highly criminal at common law * * * journeyman confederating and refusing to work unless at increased prices is indictable * * * a conspiracy to do an unlawful act though nothing be done or to maintain another in any matter whether it be true or false is indictable;" and also the Taylors of Cambridge and the Tubwomen. The defence answered that a principle so absolutely contrary to the spirit of free institutions might "be adapted to the meridian of London, Paris, Madrid or Constantinople, but can never suit the free State of Pennsylvania[3], which had not adopted it from the common law, and resorted to the *reductio ad absurdum*, always invoked against the Tubwomen. Franklin argued that under its doctrine literary and charitable societies would be criminal combinations, while Rodney, with him, declared in lighter vein that "a country dance would be criminal, a cotillion unlawful, even a minuet conspiracy, and nothing but a hornpipe or a solo could be stepped with impunity:" and stoutly denied the

[1] Vol. IV., page 136, Christian's edition.

[2] Hawkins P. C. Ch., 72, Sec. 2, note; the notes are those of Mr. Leach, also editor of Modern Reports.

[3] Cf. Gibson, J., in Com. *v.* Carlisle, *supra*.

authority of Modern, citing Burrows' marginalia condemning them.[1] He further argued that the proposition cited from the Tubwomen's Case was *obiter dictum* in so far as it transcended the fair boundary of the Tailors' case and added, "I should have been very glad to have seen this celebrated case of the Tubwomen: I believe it is not to be found,[2] if such a case exists let it be produced and I will endeavor to answer it. If the gentlemen are not able to produce it, no answer is necessary; for *et non existente & non apparente eadem est lex.*" This resourceful and ingenious argument, in default of better, did not avail. The recorder charged that "the authority cited from 8 Mod. Rep. does not rest merely upon the reputation of that book. * * * It is adopted by Blackstone, and laid down as the law by Lord Mansfield 1793, that an act innocent in an individual, is rendered criminal by a confederacy to effect it." The jury found defendants guilty and they were fined $8 each and costs.[3]

On December 12, 1809, the New York Cordwainers being charged with conspiracy it was moved in General Sessions of the Peace, Mayor DeWitt Clinton, presiding, to quash the indictment which set up that defendants, intending to form an unlawful club or combination to govern themselves and other workmen in said art and unlawfully extort money, etc., with by-laws, etc., conspired and agreed that no member would work for any master, who, after notice given to discharge one not a member of the combination, should continue to employ the same, or who should employ any violator of said by-laws, who had not paid a fine imposed

[1] "A miserably bad book entitled 'Modern cases in Law and Equity,'" 1 Burr. 386. "N. B.—Wannell's Case being here cited from 8 Mod., 267. The court treated that book with the contempt it deserves and they all agreed that the case was wrong stated *there* (I mean the old edition of that book)" 3 Burr., 1326.

[2] An able member of the Michigan Bar expressed a few years ago like scepticism, as did a western judge after a vain quest for the elusive Tubwomen.

[3] Three years later Tomlins' Law Dictionary (1809) under the title "Conspiracy," said: "Journeymen confederating and refusing to work unless for certain wages, may be indicted for a conspiracy, notwithstanding the statutes which regulate their work and wages do not direct this mode of prosecution; for this offense consists in the conspiring and not in the refusal, and all conspiracies are illegal though the subject matter of them may be lawful. See the case of the Tubwomen *v.* The London Brewers, 8 Mod. Rep., 11, 320." The citation at 320 is of Starling's Case.

for breach thereof; and also indirectly to prevent Edward Whitess from following his trade, and to impoverish him by refusing to work for certain persons who employed him; and to increase wages, and to refuse to work for any one who should have more than two apprentices at the same time to learn their art, and indirectly to impoverish divers other persons named. For the defendants, Sampson[1] attacked the whole system of common law, and declared that no American opinion sanctioned the doctrine of the criminality of agreements by workingmen to raise wages, except Recorder Levy's,[2] the soundness of which he disputed, arguing that it rested chiefly on the authority of Hawkins' statement that "all confederacies whatever, wrongfully to prejudice a third person are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person"; a rule applicable only to common law conspiracies, that is to say, maintenance and false and malicious accusations of indictable offences which were *crimina falsi*.[3] He denied that Hawkins ever wrote "that all confederacies are unlawful though the object of them be lawful," a doctrine which, he said, was taken from the case of The Journeymen Taylors, decided in 1721, whereas Hawkins' book, published in 1716, did not contain this *dictum* taken from "the worst book of English reports under which the shelf groans."[4] Reviewing all cases cited in Hawkins' original note, including Rex *v.* Alderman Sterling,[5] he said that this was a case referred to from the "miserable bad book by the title of The Tubwomen *v.* The Brewers of London." It seemed to puzzle the counsel in Philadelphia, and it puzzles us no less, to divine who these same Tubwomen could be. * * * The solution of the difficulty may be this: There was formerly in the Exchequer a barrister called the Tubman,

[1] Reported by Wm. Sampson, Esq., of counsel *supra*.

[2] In the Philadelphia Boot and Shoe Makers Case, *supra*.

[3] Cf. Turner's Case (1810) 13 East 228 wherein Lord Ellenborough C. J, (citing Godb. 444) said that all conspiracy cases proceeded upon the theory that the combination was to effect its object by falsity; and that an indictment of conspiracy to commit a mere civil trespass would not lie. Cf. Queen *v.* Daniell (1704) 6 Mod. 99.

[5] Also citing Burrowes' marginalia, *supra*.

[6] Which he cited only from 1 Lev. The case is reported (1665) 1 Sid 174; 1 Keb 650; 655; 675; 682; & 1 Levinz 125.

who was a King's counsel and had precedence. It might have been his duty to file this information; and the cause which would improperly have been entitled The Tubman *v.* The Brewers, was still more so called The Tubwomen *v.* The Brewers, by the reporter, whom the Court of Kings Bench states to have been a misstater of cases. It was about gallon beer. Gallons and tubs have some affinity, gallons being but the diminutive of tubs. *Sic canibus catulos similis, sic matribus hædos.* And between the tubman and the tubwomen there is but a syllable. A reporter so ignorant of men and things might mistake, as was his habit, and send forth the case in this report with this whimsical title." Mr. Sampson also contended that Starling's Case laid down no such principle as that attributed to The Tubwomen's; for the Judges in the former admitted that, as a general principle, meeting and consulting to impoverish private individuals, as the excisemen were[1], could not maintain a public prosecution, but that the case was exceptional in that it affected the King's revenue; or as Sampson put it "The principle of the decision seems truly to have been this, that *reges habent longas manus.*" Mr. Colden, also for the defence, argued that combinations to raise wages could only be punished as conspiracies under the statutes of laborers, prior to which no case could be found condemning them; and that the Cambridge Taylors' Case was grounded upon statute.[2] On the other hand Riker, for the prosecution, argued that by the common law of England adopted in New York, the conspiracies charged were criminal. He said: "This conspiracy unnaturally to force the price of labor beyond its natural measure is as dangerous as any kind of monopoly, and if it be tolerated, as well may be regrating, forestalling, and every other pernicious combination. Suppose all the bakers in New York were to refuse to bake till they received an exorbitant remuneration. Suppose the butchers should enter into a similar combina-

[1] But Wyndham J. in Keeble's Report deemed them public persons, see *infra.*

[2] Cf. National Protective Ass'n *v.* Cummings, *supra.* Mr. Sampson said that these statutes were "The lineal descendants, the lawful and immediate issue of pestilence and public calamity"; and cited Espinella's letters to the effect that the poverty and pain of the English working classes is such that "The workmen in certain manufacturing towns in England exhibit the strange phenomena of green hair and red eyes."

tion; and if there be impunity for them, why shall not all other artisans do likewise? What will become of the poor, whose case the counsel takes so feelingly to heart? The rich will, by their money, find supplies; but what will be the sufferings of the poor classes?" And then he advanced an hypothesis that seems both strange and familiar to-day: "Suppose that some rich speculators, acting upon similar principles, should, in a cold winter, combine to purchase up all the wood, and refuse to sell it but at an extravagant advance, should we have no law to protect the poor against such oppression?" "And would it be argued that without an express statute the law could furnish no remedy.[1] As such acts would be against the public good, and immoral in a high degree, they would therefore fall under the animadversion of the general law; and, as offences against the whole community, be subject to public prosecution." Emmett, with Riker, controverting the proposition that conspiracy does not lie at common law except in connection with *crimina falsi*, which were infamously punished, citing Cope's Case[2], argued that Hawkins rested on good authorities, of which the most important is Starling's Case, holding that "either a conspiracy unlawfully to prejudice other individuals or the public at large, is an offence," and that "all confederacies whatever wrongfully to prejudice a third person are highly criminal" at common law in this country.[3] Admitting some cases in Modern to have been badly reported, he maintained that others had never been questioned, and that East, the most recent authority on crown law, relied upon the Taylors' Case in stating the principle that "an indictment lies whenever either the conspiracy is entered into for a corrupt and illegal purpose [or for the use of unlawful means to effect a legal purpose], although such purpose be not effected," a doctrine broadly laid down in the Taylors' Case, and supported by that of The Tub-women *v.* The Brewers of London[4], "which," he said,

[1] See Peo. *v.* Sheldon (1890) 66 Hun 590 afd. (1893), 139 N. Y. 251; Cummings *v.* Union Blue Stone Co. (1900) 164 N. Y. 401.

[2] (1718) 1 Stra. 144; conspiracy to ruin a card maker by putting grease into his paste; and Sir Francis Delaval's Case (1763) 3 Burr 1434 conspiracy to assign a woman with her consent to immoral purposes. Cf. Note Skinner *v.* Gunton, 1 Wm. Saunders 230.

[3] 3 Wilson's Lectures 118.

[4] This is an argument that an overt act need not be proved and not that what A may lawfully do may be the purpose of a conspiracy.

" has puzzled not only the opposite counsel, but those in a neighboring State have examined the question to know where that case is to be found and what it means. My learned friend, however, has settled into the belief that it means the case of The King *v.* Alderman Sterling and others, already commented upon. In this I concur, although not for the reasons he assigns, for it having been tried and decided in the Kings Bench, the tubman of the Court of Exchequer could have nothing to say to it; and even if he had I do not see why its being conducted by an officer, called the tubman of the court, should entitle it to be called the Tubwomen's Case (1). The truth, I presume, is that the small beer, called gallon beer, mentioned in that report as being sold to the poor, was hawked about, as similar beverages are in many countries, and sold in the streets by women who, from their occupation and the vessels in which was contained the article they sold, were called tubwomen. And when the brewers of London combined not to make or permit any more such beer to be made, by which the occupation of these women was ruined, it is very probable that their interest and activity against the brewers made them conspicuous personages in the cause and procured that name for the case. Be that, however, as it may, the case of King *v.* Sterling undoubtedly contains the principle that supports the case in 8 Mod.; that any conspiracy *to do a wrongful act, tending to public injury or the impoverishment of third person is indictable* (2)." It would thus appear that if Sterling's Case be, in fact, the same with that of the Tubwomen, it was not cited by these learned counsel for the broad proposition attributed to the latter in the Taylors' Case, but rather to the point that the agree-

[1] So Mr. Wright (page 42), impugning the authority of the Taylors' Case, points out that while the defendants were tailors of Cambridge, the case is made to turn on 7 Geo. 1 c. 13, which only applied to the metropolis.

[2] Our italics. Here again it is to be noted that the italicized proposition is not that attributed to the Tubwomen, namely, that the conspiracy is indictable, although the act with which it is concerned may be lawfully done by individuals. Mr. Emmett further offered from the Liber Assizarum 27 Ed. 111 page 138, 139, a list of matters to be inquired of by inquest of office in the King's Bench, including covin or alliance of merchants to raise the price of wool, as ancient authority to show that conspiracies, whose gravamen was impoverishment of the people, were common law offences not dependent upon the plague or the Statute of Laborers.

ment, tending to impoverish third persons, was unlawful and indictable even without an overt act. The reporters of the King *v.* Sterling do not entirely agree. They are not in accord even as to the punishment inflicted. Siderfin says, "*Et puis ils fueront fine in 2,000 marks. Scil. Chescun forsque est 100 marks & il 500,*" an inaccurate computation, since there were sixteen defendants besides Sterling. Keble says, "The court fined him (Sterling) 300 marks and the rest 100 marks apiece as the first warning;" and Levinz says, "Thereupon they fined Sterling 1,000 marks and the others 300 marks each." The information as set out in Siderfin,[1] "*fuit preferr vers S. & les auters, Brewers de Lond' pur ceo que ils fueront de confederacy, ont conspire pur deprender le Gallon Trade (que est ceo per que les povers sont supply) & pur cause les povers de mutiny vers les Fermors del Excise, Et l' information ouster recite que lou L'excise est settle sur le Roy per Act de Parliament & part de son Revenue Les Defendants ont per combination & confederacy endeavour p̄ depauperate les Fermors del Excise.*" Upon plea of "*Rien culp̄*," the jury found defendants "*Culp̄ de rien forsque le conspiration pur depauperate les Fermors del Excise. Et fuit move pur quash cet Information;*" because there was no allegation of *vi et armis*; but the court held this unnecessary, because "*Confederacies & conspiracies ne sont properment ove Force mes secret et occult sans overt poyar:*"[2] and, more important, because defendants were found guilty of no offence, since they were acquit of everything "forsque l'impoverishing del Fermors, *& nest ascun offence punishable per nostre Ley pur depauperate auter al intent de inrich moy mesme come per vender commodities al cheaper rates*".[3] But the court, after many debates, more fully set out in Keble, sustained judgment for the king upon the ground that the verdict related to the information, which recited that the excise was part of his revenue, and, therefore, that to impoverish the farmers was to wish to make them incapable of paying the king his due. "*Et comment la ne poit estre conspiracy sans ascun overt act de plusors, uncore ils touts agreé que le con-*

[1] 1 Sid. 174. [2] Our italics. Citing 29 Ass. 45; Stamford 95 F.

[3] This is the argument still brought forward in defence of all combinations, whether of capital or labor. Cf. Mogul SS. Co. *v.* MacGregor (1889), 23 Q. B. D. 598; [1892] A. C. 25.

federacy icy est act punishable pur que judgment serra done pur le Roy," that is to say, it was recognized that there was not a conspiracy but a confederacy, and that the offence committed was punishable solely because it related to the king; and, accordingly, the court imposed a mere fine, instead of the villainous punishment attaching to conspiracy, and even refused to hear testimony to aggravate the offence in order to increase the fine.

Levinz reports the information as charging that defendants "did factiously and unlawfully assemble themselves and conspire to impoverish the Excisemen, and made Orders that no Small Beer called Gallon Beer should be made for such or so long a time to be sold to the Poor, nor no ale but of such a price, with intent to move the Common People to pull down the Excise House and bring the Excisemen into the Hatred of the People, and to impoverish and disable them from paying their Rent (being 118,000 £ per annum) to the King." Being found guilty of assembling and consulting to impoverish the excisemen, but not guilty of the residue, defendants urged in arrest of judgment that, having been found guilty only of conspiring without any act done—not being guilty of making the orders—they were not punishable at the King's suit, but only at the suit of the private persons, the Excisemen, if they were endamaged, also that the contriving to impoverish the Excisemen was uncertain in meaning, as it may have been by bringing actions against them for just debts. But the Court holding that the conspiracy tended to the Publick because it concerned the king's revenue; that the verdict relating to the charge, to wit, factious and unlawful conspiracy, well enough explained what kind of impoverishment was intended; and that "A conspiracy to do an unlawful thing is punishable without any Overt-act done,"[1] gave their opinions that judgment should be given for the king; Hyde, Twysden and Kelynge saying "That the bare Conspiracy in this Case to diminish the King's revenue, without any act done is fineable."[2] Keble reports Keeling

[1] Citing "9 Co. Rep. Poulters (sic) Case" Moor 788, and Lord Gray's, Scrogg's and Midwinter's Cases, (1636) in the Star Chamber. Not so Siderfin.

[2] Citing 27 Ass. 44; 43 Ass. 20.

of opinion "that this bare conspiracy is a great Crime, where it is to do that which is evil, although to private person * * * but whatever concerns the King's Revenue is publick." Windham, that "They are acquitted of Conspiracy, which properly is where it is to Indict men for their Lives, and this is that whereon the Writ lieth * * * if it were a conspiracy, there ought to have been some Overt Act expressed[1] * * * I do conceive the defendants found Guilty of Confederacy, as in the Poulterer's Case;" and also that the "customers" were publick persons: Twisden, that defendants were guilty of unlawful Assembly and Conspiracy, which was all one with Confederacy; and that while intent is fluctuating and not punishable until acted on, it is sufficiently evidenced by the act of assembly and consulting; also that the King's Treasure is publick: Hyde, that the jury's finding, that "it was *factiosè illicitè* and unlawfully *assemblaverunt* and *congregaverunt*," was sufficient for them to give judgment, and that such assemblies are punishable as prohibited by law though no act be done; that the King's Revenue was publick and that it would be punishable to conspire to deprive a private person of his Rents, though not so great. And thus we find that in the separate opinions of the judges, as well as in the court's judgment, there is assertion, not of the broad rule attributed to The Tubwomen's Case, but, at most, of the doctrine that overt acts are not necessary to make out the offense, whether of confederacy or conspiracy, in addition to an unlawful agreement; and that the real point of the decision was the depauperating of the king's farmers and therefore his revenue, which some opined might also be an offence in the case of a private person. Therefore, if the Tubwomen's Case be identical with Sterling's, its principle was misstated in the Taylors' case, prior to which the nearest approximation to the doctrine attributed to the Tubwomen was expressed in Thorpe's Case[2] by counsel who, *arguendo*, said "That which is lawful for one man to do may be made unlawful to do by conspiracy: for instance it is lawful for any brewer to brew small beer, but if several shall conspire to brew no strong but all small beer, on purpose to defraud the king of his

[1] This corresponds with Siderfin. [2] (1696) 5 Mod. 221.

duties, such conspiracy is unlawful. And so it was held in Sir Samuel Sterling's Case, who, because he could not farm the excise, did confederate with several brewers to brew small beer only." This statement in the subjunctive is very different from that of the broad indicative in the Tubwomen's Case. But in Queen *v.* Daniel[1], wherein two were charged with enticing a servant from his master, Holt, C. J., said, "The case of Sterling was directly of a public nature and levelled at the government and the git of the offence was its influence on the public and not the conspiracy, for that must be put into execution before it is a conspiracy;" and he was also of opinion that a conspiracy to do a private wrong was not indictable.[2]

If the Tubwomen's rule be transposed from the indicative to the subjunctive, as it was quoted in Thorpe's Case, and made to read "A conspiracy *may* be illegal although the matter about which defendants conspired might have been lawful for them or any of them to do, if they had not conspired to do it," thus limiting its generality, it will be found to be still approved by high authority. Indeed it was pronounced to be settled law in the People *v.* Fisher[3], wherein the Court held a conspiracy of shoemakers, to increase wages by coercing masters and other workmen by indirect means, to be indictable under the Revised Statutes of New York, which early classified criminal conspiracies and provided that overt acts should be alleged and proved[4],

[1] *Supra.*

[2] This obiter also seems to follow Siderfin but to be against the weight of the *dicta* in Keble from which it appears that the judges, although they regarded the excisemen as public persons, seemed also of opinion that the writ would lie for the conspiracy to depauperate a private person. In King *v.* Eccles (1783) 3 Doug. 337, Lord Mansfield held that an indictment charging conspiracy by indirect means to deprive Booth, a a tailor, from exercising his trade and reduce him to poverty, was good without stating the means; and Lord Coleridge said in Mogul SS. Co. *v.* McGregor, *supra*, that for the principle involved the decision was as good law as when uttered.

[3] (1835) 14 Wend. 9, at 16. This case has been cited with approval down to our own time. See Hooker *v.* Vandewater (1847) 4 Den. 349 at 343; Johnston Harvester Co. *v.* Meinhardt (1880) 9 Abb. N. C. 393 at 399; Leonard *v.* Poole (1889) 114 N. Y. 371 at 377; Old Dominion SS. Co. *v.* McKenna (1887) 18 Abb. N. C. 262 at 282; Peo. *v.* Milk Exchange (1895) 145 N. Y. 267 at 274; Peo. *v.* Sheldon, *supra*; State *v.* Donaldson and other cases *supra.*

[4] See note to Revised Statutes Part IV Ch. 1 Title 6 Sec. 8 Vol. II p. 576; the note Vol. III p. 828 Edition 1838 assigns the revisers reasons for providing by Sec. 10 that no agreements except to commit felony on the person, arson or burglary shall be deemed conspiracy without overt act.

and placed the decision squarely upon the principle that "competition is the life of trade." But we are told that the decisions so holding were founded upon exploded ideas of political economy; and that no act which an individual may do lawfully can become unlawful because done by many in combination; and no lawful act can become unlawful merely because done with an evil motive. Such general propositions seem to be as open to criticism as the equally broad rule of the Tubwomen. As to the former proposition: It has been said recently by high authority, entitled to great deference and respect, "Whatever one man may do alone he may do in combination with others provided they have no unlawful object."[1] Does this dictum afford a working principle? And what are we to understand by the term "unlawful" in the proviso? Does it mean, "actionable civilly or criminally;" or "void, as unenforceable at law," or "the converse of the biblical 'lawful and right?'" If the dictum means that men in combination may do by legal methods for legal ends whatever an individual may so do, it only states what has probably always been the common law.[2] If it means that because combinations, formerly indictable, are now legalized by statute for certain trade purposes or disputes, therefore many in combination may do without legal liability everything that an individual might do without subjecting himself to a civil or criminal action, then it would seem to be too broadly stated. And if it implies that a combination may not do for an "unlawful object" what an individual might lawfully do for the same object, it admits that the multitude of actors may still, if operating in concert to the prejudice of others, render actionable what an individual might do without legal liability.

As to the latter proposition: in Quinn *v.* Leathem[3] Lord Macnaghtan said, "The sum of Allen *v.* Flood is what was said by Parke B. in Stevenson *v.* Newnham, 'An act which does not amount to a legal injury cannot be

[1] National Protective Ass'n *v.* Cummings, *supra*, at 321.

[2] Cf. Lord Bramwell in Mogul Appeal [1892] A. C. at 47.

[3] [1901] A. C. 495, at 508.

actionable because it is done with a bad intent.'"[1] But in Leathem's case all the Lords agreed that Flood's[2] was decided on a theory that the evidence proved not a conspiracy, not even a threat, but only a warning by Allen, the sole defendant, to the employer of the plaintiffs, Flood and Taylor, that union men would adopt a certain course if Flood and Taylor were not discharged. Now, as it is lawful under any circumstances for an individual to give such a warning as was given, Flood's motive did not render actionable his otherwise legal act. Thus the generality of the decision was limited by the facts found to the case of an individual only, and does not necessarily apply to cases of conspiracy.[3] Motive or intent to commit public injury or private oppression or to interfere with the rights of others cannot be so absolutely severed from the idea of conspiracy; for, while the gist of that offence is the agreement, the animus or purpose of the agreement is also regarded. In the leading American case of Commonwealth *v.* Carlisle[4] upon a motion to discharge under writ of habeas corpus certain master shoemakers indicted for conspiracy to reduce wages, Gibson, J., refusing the application, said in one of the most lucid opinions rendered upon conspiracy, and one constantly quoted "I take it, then, a combination is criminal wherever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates and giving effect to the purposes of the latter whether of extortion or mischief. According to this view of the law a combination of employers to depress the wages of journeymen below what they should be, if there was no recurrence to artificial means by either side, is criminal"; and again, "Where the act is lawful for an

[1] [1853] 13 C. B. at 297. This was an action for wrongfully and maliciously seizing goods as and for a distress for more rent than was really due. Held that the distress not being actionable *per se*, would not be made so by using the word maliciously. But if malice, *i. e.*, intent, motive, is an element of the "legal injury," this dictum would not seem to apply.

[2] [1898] A. C. 1.

[3] In fact Lord Davey said in Allen *v.* Flood, *supra*, at 172. "This, I will remind your Lordships, is not a case of conspiracy. I do not say whether if it were, it would or would not make an essential difference.

[4] *Supra.*

individual it can be the subject of a conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence"[1]; and again "The motive may also be as important to avoid as to induce an inference of criminality. The mere act of combining to change the price of labor is perhaps evidence of impropriety of intention but not conclusive; for if the accused can show that the object was not to give an undue value to labor, but to foil their antagonists in an attempt to assign to it, by surreptitious means, a value which it would not otherwise have they would make out a good defence."[2] A distinction then is to be drawn in gauging the quality of acts alleged to be in restraint of trade, oppressive, or to the public harm, according as they are done solely to further one's own interest—although at the expense of another—or to injure that other without, as it is said, "just excuse[3]"; which is only the modern way of saying what was urged for the defence in *Starling's case*. "*Nest ascun offence punishable per nostre Ley pur depauperate auter al intent de inrich moy mesme per vender commodities al cheaper rates*"; and this is the doctrine of the Mogul Case.[4] No act amounts to a legal injury civilly actionable unless damage results; and, of course, in the absence of legal damage, evil motive alone cannot give rise to a cause of action. But where A is wronged by B, the latter's liability, *i. e.*, whether A has a cause of action even on the civil side of the law, may depend upon the intent or motive with which the act complained of was done. Thus the privilege of the occasion allows an employer to speak frankly to one seeking references as to his servant; but an evil motive, whether evidenced by actual malice or gross carelessness, destroys the privilege of the occasion. An arrest, otherwise lawful, *i. e.*, justifiable, may by its mo-

[1] Cf. Farmers' Loan & Trust Co. *v.* Northern Pacific R. R. [1894] 60 Fed. 803 modified by Arthur et al. *v.* Oakes [1894] 63 Fed. 310.

[2] This would afford to employers ordering a lockout a defence if they did so to meet a strike. Cf. Hilton *v.* Eckersley, *supra*.

[3] Quinn *v.* Leathem, *supra*. [4] *Supra*.

tive give ground for an action of malicious prosecution; and the same element of motive differentiates the use from the abuse of process.[1]

So that, however pretty the theory may be that combinations of men may do lawfully what each individual of them may do, and that the motive with which they act does not affect their liability, the preponderance of judicial opinion recognizes the obvious fact that the multitude may coerce and ruin a man by simultaneity in doing acts, which, if done by an individual, would be either lawful or so harmless as to be not actionable, even if actuated by bad motives. Thus in the Mogul Case, in the Queen's Bench Division, Bowen, L. J., said[2] "Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's just rights * * * and it may be observed in passing that as a rule it is the damage wrongfully done and not the conspiracy that is the gist of actions on the case for conspiracy." And Fry, L. J., said the act may be unlawful (a) because unlawful in each of the agreeing parties if he did it alone or (b) "because though lawful in one it is unlawful in two or more."[3] And in the same case in the House of Lords,[4] the Earl of Halsbury, L. C., said "My Lords, I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons become unlawful";[5] and Lord Bramwell said, "It has been objected by capable persons, that it is strange that that should be un-

[1] Lord Herschell in Allen *v.* Flood, *supra*, at 125 considers this "an exceptional case"; and that in actions of libel and slander legal liability does not depend on the presence or absence of malice; but that even if it could be established that in a certain well-defined class of cases "it is settled law that an evil motive renders actionable acts otherwise innocent, that is surely far from shewing that such a motive always makes acts prejudicial to another which are otherwise lawful." Query: is not conspiracy one of the class of cases in which evil motive so operates?

[2] 23 Q. B. D. at 616. [3] S. C. 624.

[4] *Supra*, at 38. [5] (1892) A. C. at 38.

lawful if done by several which is not if done by one, that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two; one is that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act when done by an individual is wrong, though not punishable, because the law avoids the multiplicity of crimes, *de minimis non curat lex*, while if done by several it is sufficiently important to be treated as a crime."[1] So in Quinn *v.* Leathem, Lord Brampton quoting approvingly the words of Lord Bramwell in Druitt's Case [2] that "the liberty of a man's mind and will to say how he should bestow himself and his means, his talent and industry, was as much a subject of the law's protection as was that of his body, said: "Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful, if done separately without conspiracy, may, with conspiracy, become dangerous and alarming."[3] And Lord Lindley said[4] that the important proposition laid down in Allen *v.* Flood is that "An act otherwise lawful although harmful does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another.' That is not new doctrine but never before so fully expounded. Criminal responsibility was not considered, for it would revolutionize criminal law to say it does not depend on intent, and civilly it only applies to acts involving no breach of duty, no wrong to anyone. But all wrongful acts done intentionally to damage a particular individual and actually damaging him are civilly actionable; and on this Temperton *v.* Russell[5] may be upheld, although Esher, M. R., went too far in holding that an evil motive would render actionable a lawful act whether anything wrong was done or not." And

[1] (1892) A. C. at 45. [2] [1867] 10 Cox C. C. 592.

[3] (1901) A. C. at 530. Citing the Mogul Case and those of Eccles, Mawbey and The Cambridge Taylors resting on The Tubwomen, *supra*.

[4] (1901) A. C. at 533.

[5] [1893] 1 Q. B. 435, 715. Lord Macnaghten also said that Allen *v.* Flood did not in the least shake the authority of Temperton *v.* Russell.

again he says:[1] "It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable; and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants have could have acted as they did, and, if he had done so, I can see that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action." Yet again he says: "My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce."[2] And all the Lords agreed, in Quinn *v.* Leathem, that Lumley *v.* Gye[3] was rightly decided, wherein it was held actionable maliciously to persuade a singer to break her contract with her impressario.[4]

The latest reported English case in which the judicial mind has essayed to grope its way in the labyrinth of conflicting metaphysical *dicta* that abound in this branch of the law is Glamorgan Coal Co. *v.* South Wales Miners' Federation.[5] Seventy-four owners of collieries brought action against the Federation and its executive officers to recover damages for maliciously procuring certain workmen of plaintiff's to break their contract. Bigham, J., who passed on the law and facts, found that it was to the interest of

[1] (1901) A. C. at 537.

[2] Citing Vegelahn *v.* Guntner (1896) 167 Mass. 92 to the point that coercion may be exercised without physical violence.

[3] [1853] 2 E & B 216.

[4] It is argued that it is wrong to persuade an employee to break a fixed contract, although permissible to persuade him to quit indefinite service; and that the word "maliciously" was not necessary to sustain the judgment in this case: wherein it was also said by Wightman, J., that the Statute of Laborers (25 Ed. III) sequent on the plague, applied only to manual laborers, whereas the common law remedies were limited to no description of servants.

[5] [1903] 1 K. B. 118.

both parties to maintain a high price for coal, but that they differed in policy, the defendants, with no intent to injure the masters, proclaiming "stop days," so as to limit production contrary to the owners' views of their interest. The Court said that in all the cases cited to him of recoveries for procuring breach of contract the element of actual malice was regarded as essential,[1] thus differing with Crompton, J., in Lumley *v.* Gye, whose dictum that "with notice" is equivalent to "wrongfully and maliciously" the Court did not consider good law, if it meant that a mere notice of the contract's existence raises an irrebuttable presumption of malice; since that would prevent a brother from persuading a sister to quit an unhealthful employment, and render everyone who, with such notice, should employ B, who had broken a contract with A, guilty of tort toward A. From the cases cited the Court deduced the rule that what a man does in the use of his own property or exercise of his own trade for his own advantage is not actionable, although it injure another and seem selfish and unreasonable; while the same thing is actionable, if done on purpose to harm or to injure another, without reference to the actor's own lawful gain, or the lawful enjoyment of his own rights; in the decision of which question the good sense of the tribunal before which it came would have to analyze the circumstances and discover on which side of the line each case fell. Having found in the discharge of this function that the acts of the individual defendants were not unlawful or malicious, and that there is good authority for saying that a combination entered into for the mere purpose of doing a lawful act cannot constitute an actionable conspiracy, unless entered into with a malicious intention of damaging the plaintiff, and actually causing him damage; the Court found for the defendants; but, adding, in obvious and excusable incertitude, the suggestion that in the event of reversal it would be necessary to look into the matter of damages, urged the parties to agree among themselves.

What are we to conclude then, from this examination of the Tubwomen's rule? Apparently this: That at no

[1] Citing Lumley *v.* Gye, *supra*; Bowen *v.* Hall [1881], 6 Q. B. D. 333. The Mogul case, *supra*; Reg. *v.* Rowlands [1851] 17 Q. B. 671; and other cases *supra*.

time has every confederation of men for a common purpose been unlawful; but at every time, and at the present moment, such a combination, whether of laborers or capitalists, may become liable civilly, and, except as the common law has been modified by statute, criminally, although its purpose be only to do that which its individual members might do without incurring legal liability; furthermore, that such combinations may be unlawful in the sense of being unenforceable *inter se*, even when they do not subject their members to liability in actions, civil or criminal. We also seem justified by weight of authority in concluding that, while the existence of malice alone does not give rise to a cause of action, bare intent being fluctuating, as said in Starling's case, and not actionable, and while, generally speaking, the motive of a sole actor will not subject him to legal liability for an act within his right, and involving no breach of legal duty, even though damage result therefrom to a third person, nevertheless liability for crimes, of which conspiracy is one, does depend upon intent, except in certain statutory offences absolutely forbidden; and so, too, in a well-defined class of civil cases, including not only libel, malicious prosecution and abuse of process, but also cases of fraud, evil intent is the criterion by which legal liability is fixed. Nor are we without authority for saying that such an expression as "There can be no conspiracy to do a lawful act" is a mere begging of the question. To be sure, the gist of conspiracy is an agreement; but an agreement to do something harmful and unjustifiable, not something beneficial; to infringe the rights of those against whom the conspiracy is directed, not merely to exercise rights to the incidental injury of third persons; and consequently the intent of the conspirators becomes an element in determining, not only their criminal, but also their civil, liability; especially now that the remedy of those aggrieved is coming to be that of injunction and not that by indictment. Finally we may still say, as did Mr. (afterwards "Sir") James Fitz-James Stephen forty years ago: "The law of conspiracy as it stands is an awkward and unsightly, but in some respects highly convenient, patch upon an old and ragged garment."

WILLIAM A. PURRINGTON.